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No. A-1031

In The
Supreme Court Of The United States

October Term, 1983

DENNIS BARNES McCRANIE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Ken Ray Underwood
Attorney at Law
1424 Terrace Drive
Tulsa, Oklahoma 74104
(918) 744-7200
Attorney for Petitioner

QUESTIONS PRESENTED

I

Did the Drug Enforcement Agency violate the Defendant's Fourth Amendment rights by detaining him on two successive occasions during air travel without reasonable suspicion based upon articulable facts for such a seizure?

II

Did the use of a trained dog to detect contraband in the Defendant's luggage constitute a search in violation of the defendant's Fourth Amendment rights?

III

Was there probable cause to issue a search warrant as required by the Fourth Amendment?

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CONSTITUTIONAL AMENDMENTS

United States Constitution
Fourth Amendment 2

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DECISIONS BELOW

Petitioner's judgment of conviction was entered on January 5, 1982, (Appendix A). The Tenth Circuit Court of Appeals affirmed the conviction on March 25, 1983, (Appendix B). The Defendant's Motion for Rehearing and Rehearing En Banc were denied by Order Nunc Pro Tunc on May 13, 1983, (Appendix C). The Petitioner was granted extended time to file Petition for Writ of Certiorari on June 23, 1983 until August 10, 1983, (Appendix D).

JURISDICTION

The Judgment of the En Banc Court of Appeals was entered on May 13, 1983. Justice White extended the

time within which to file a Petition for Certiorari to August 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I

Did the Drug Enforcement Agency violate the Defendant's Fourth Amendment rights by detaining him on two successive occasions during air travel without reasonable suspicion based upon articulable facts necessary for such a seizure?

II

Did the use of a trained dog to detect contraband in the Defendant's luggage constitute a search in violation of the Defendant's Fourth Amendment rights?

III

Was there probable cause to issue a search warrant as required by the Fourth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution Amendment IV: The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

21 U.S.C. §841(a): Except as authorized by this title, it shall be unlawful for any person knowlingly or intentionally (1) to manufacture, distribute, or disperse, or possess with intent to manufacture, distribute or disperse, a controlled substance; . . .

STATEMENT OF FACT

On September 22, 1981, the Petitioner, DENNIS BARNES McCRANIE, was living in Naples, Florida, which is also known as Golden Gate, Florida, (November 12, 1981 Transcript, Page 174, Lines 8-15). On the particular day in question the Petitioner was traveling to Tulsa, Oklahoma to visit his two children by a previous marriage living with their mother, Marla McCranie, in Tulsa, Oklahoma. The Petitioner had departed from the airport at Fort Myers, Florida after driving from Naples, (Transcript of November 12, 1981, Page 175, Lines 3-24).

The travel schedule of the Petitioner was unremarkable as that of any normal citizen traveling through the United States. The Petitioner had booked his flight through the Brooks Travel Agency in Naples, Florida, under his own name, that of DENNIS BARNES McCRANIE. The Petitioner paid for his airline tickets by Mastercharge and entered his own telephone number of 455-4749 on both the charge card and the Delta tickets so that he could be reached in the event of a scheduling change, (Transcript of November 12, 1981, Page 176, Lines 2-18).

The Petitioner proceeded from Fort Myers, Florida to Tampa, Florida and then on to Atlanta, Georgia where he departed the airplane and exited as any normal passenger would, checking with the ticket agent only to find from which gate his next flight would be departing. The Petitioner made no phone calls and did not engage in any specific suspicious conduct during his layover, (Transcript of November 12, 1981, Page 177, Lines 2-25 and Page 178, Lines 1-24). Contrary to the normal drug courier profile, the Petitioner took out a baggage claim

ticket in his own name and carried luggage large enough to hold extensive clothing, (Transcript of November 12, 1981, Page 179, Lines 3-11).

Upon disembarking from the airplane at Atlanta, the Petitioner was observed by Agent Paul Markonni. His mannerisms were subjectively characterized by Agent Markonni as exhibiting unusual nervousness. Specifically, the Petitioner looked around and gazed out windows. Agent Markonni checked to determine the origin of the Petitioner's flight. Having characterized South Florida as a drug source, Agent Markonni approached the Petitioner and said he was looking for a load of drugs coming from Florida, (November 12, 1981 Transcript, Page 179, Lines 17-24). Pursuant to the request of Agent Markonni the Petitioner exhibited his ticket and his driver's license, each of which confirmed that he was traveling under his own name. When asked, the Petitioner gave Agent Markonni his home telephone number and explained that his travel plans were for the purpose of visiting his children of a previous marriage in Tulsa, Oklahoma, (November 12, 1981 Transcript, Page 180, Lines 1-12). During this conversation, Agent Markonni was seated next to the Petitioner and a second police officer, Detective Burkhalter, was seated directly behind the Petitioner. Drug Enforcement Agent Markonni conducted a further interrogation of the Petitioner for a period of three to four minutes, including a request that a personal search be conducted and that a search of the Petitioner's luggage be allowed, (November 12, 1981 Transcript, Page 180, Lines 15-25).

During this brief encounter the Petitioner had exhibited no articulable facts which could be construed as conforming to the drug courier profile other than

those subjective observations made by Agent Markonni. However, Agent Markonni stated to the Petitioner "I don't have enough evidence to hold you, but you will be met, you will probably be met in Oklahoma by Federal authorities and possibly a dog capable of detecting drugs." (November 9, 1981 Transcript, Page 18, Lines 1-14). The Petitioner then proceeded to his flight from Atlanta to Tulsa, Oklahoma. Upon disembarking the airplane at Tulsa, Oklahoma, the Petitioner went directly to the Avis Rent-A-Car office and rented a car while watching for his luggage. The Petitioner rented the car under his own name, DENNIS BARNES McCRANIE, and paid by Mastercharge, (November 12, 1981 Transcript, Page 181, Lines 21-25 and Page 182, Lines 1-14).

During the Petitioner's flight from Atlanta to Tulsa, Agent Paul Markonni ran a record check on DENNIS BARNES McCRANIE. Agent Markonni found that the Petitioner had a prior conviction for petty larceny, a vague reference to a mental entry in about 1975 and four counts of sale and possession of a controlled substance in about 1969, (Transcript of November 9, 1981, Page 36, Lines 19-23). This information was relayed to the Drug Enforcement Agent, Walter M. Zablocki, in Tulsa, Oklahoma. Agent Zablocki had awaited the arrival of the Petitioner at the Tulsa International Airport. The Petitioner was observed by Agent Zablocki in Tulsa, Oklahoma renting a car and paying by charge card.

The Petitioner then proceeded to the luggage area, picked up his luggage and attempted to exit the airport. Approximately three steps from the door he was summoned by Agent Zablocki, a Tulsa DEA Agent, and a

uniformed Tulsa Police Officer, (November 12, 1981 Transcript, Page 183, Lines 23-25 and Page 184, Lines 1-13). At that point, Officer Zablocki and the Tulsa Police Officer, in uniform, directed the Petitioner to an isolated part of the airport by police guard, (November 12, 1981 Transcript, Page 184 and 185). Agent Zablocki ordered the Petitioner to sit down and read to the Petitioner his rights, at which point the Petitioner assumed he was under arrest, (Transcript of November 12, 1981, Page 186, Lines 1-5). Consistent with *Dunaway v. New York,* 442 U.S. 200 (1979) and *United States v. Mendenhall,* 446 U.S. 544 (1980), a person is seized within the meaning of the Fourth Amendment of the Constitution of the United States when an officer of the law takes action that would induce a reasonable person to believe that he was not free to leave. At the time Petitioner was read his rights and, as promised, investigated for the second time during the day, no reasonable articulable facts had been established that would give rise to conducting a continuing investigation of the Petitioner.

In all respects the Petitioner's conduct was contraindicative of a drug courier. He had luggage checked in his own name, he had paid for his ticket by credit card through a local travel agency using his own name, he have given his own telephone number as a callback for his ticket agent and Delta Airline Agent, he made no suspicious telephone calls or stops, his ticket and driver's license both showed his name, DENNIS BARNES McCRAINE, he paid for a rental car by credit card and used his own name in doing so, (November 12, 1981 Transcript, Page 181, Lines 21-25 and Page 182, Lines 1-4). At the request of each drug enforcement agent the Petitioner gave a reasonable explanation for

his trip to Tulsa, Oklahoma to visit his children by a previous marriage.

However, in spite of the lack of objective facts linking the Petitioner to a drug courier profile, he was questioned in Tulsa for approximately ten minutes and repeatedly requested to surrender his luggage for a search, (November 12, 1981 Transcript, Page 187, Lines 5-18). During the ten-minute period three more uniformed officers appeared, all carrying guns, (November 12, 1981 Transcript, Page 188, Lines 17-25). Each of the officers positioned himself to block any exit that might have been available to the Petitioner at the airport, (Transcript of November 12, 1981, Page 189, Lines 3-10).

At the Tulsa International Airport Officer Hall of the Tulsa Police Department was conducting canine exercises with a dog named T.J. who had recently completed a twenty-two week school in *explosives identification* at Lackland Air Force Base. It was stated that the canine had a 98% record of correctly identifying, by smell, *explosives*. Petitioner was held while the *bomb detecting dog* was brought to the isolated portion of the airport where the officers had detained the Petitioner.

The *bomb detecting dog* was then led on a search pattern in front of Petitioner's luggage. This was the only piece of luggage existing in a portion of the airport that was isolated to the general flow of traffic. The bomb detecting dog did react and the Petitioner was then taken to an investigation room for further interrogation, accompanied by five uniformed police officers, (Nobember 12, 1981 Transcript, Page 192, Lines 11-25). Once again the Petitioner was interrogated by the bomb

squad, Agent Zablocki and numerous other officers, (Transcript of November 12, 1981, Page 194, Lines 10-25). The Petitioner was held approximately forty-five minutes longer until finally Agent Zablocki decided to let the Petitioner go, returning to him his driver's license but retaining his luggage, (November 12, 1981 Transcript, Page 194, Lines 10-18). From the time of the first detention, seizure or stop of the Petitioner until the time of his release, his testimony indicated that approximately one hour had lapsed, (Transcript of November 12, 1981, Page 195, Lines 9-11). Shortly after the Petitioner's release, drug enforcement Agent Walter Zablocki filed an Affidavit for Search Warrant resulting in the issuance of a Warrant to search the Petitioner's luggage for explosives and components of an unregistered explosive device, fruits, evidence and instrumentalitites of a violation of 26 U.S.C., §5861 and 18 U.S.C., §842(A)(3)(a), (Appendix E). The luggage was forced open by Agent Zablocki and a white powder substance was found.

The Petitioner filed a Motion to Suppress the Evidence based on an illegal search and seizure. After hearing testimony and upon stipulations, the Trial Court found that the stop or detention in Atlanta was proper and the intention by Agent Zablocki, Tulsa, Oklahoma, was not in violation of the Petitioner's Fourth Amendment rights and that the Warrant issued upon the Affidavit was appropriately issued and probable cause existed for the issuance of the Warrant.

On November 17, 1981, the Petitioner was found guilty of a violation of 21 U.S.C., §841(A), and judgment and sentence were pronounced January 5, 1982. The Trial Court's ruling was sustained by the United States

Court of Appeals for the Tenth Circuit on March 25, 1983. Judge McKay dissented. He noted that Petitioner's conduct was continually unremarkable and that the factors relied upon by the drug enforcement agents were consistent with the behaviour of an innocent citizen. *Reed v. Georgia,* 448 U.S. 438, (1980).

Judge McKay further doubted the credibility of using a bomb detecting dog to justify further detention of a suspect who had been detained on the basis of an otherwise inadequate drug courier profile.

The Petitioner's Motion for Rehearing and Rehearing En Banc were denied on May 13, 1983, Judges McKay and Seymour voting to grant Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

THE COURT'S DECISION IS IN CONFLICT WITH *TERRY v. OHIO,* 392 U.S. 1 (1968) AND *FLORIDA v. ROYER,* ___ U.S. ___ (1983)

Law enforcement officials have been granted limited intrusions into an individual's Fourth Amendment rights for the purpose of making an investigatory detention of persons suspected of criminal activity. A seizure of an individual and/or his luggage must be premised on objective facts that the individual is engaged in criminal activity and that the luggage contains contraband or evidence of a crime. *United States v. Place,* ___ U.S. ___ (1983). This detention must be of a limited duration and conducted in the least intrusive manner possible, *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975).

The conformity with certain aspects of a drug courier profile does not automatically create a particularized suspicion which will justify an investigatory stop, *Reed v. State of Georgia*, 448 U.S. 4381 (1980) and *Florida v. Royer*, ____ U.S. ____ (1983).

When the Petitioner was first confronted by Agent Paul Markonni upon deplaning at the Atlanta Airport, there were no objective facts that could reasonably direct suspicion to the Petitioner. The Petitioner was merely traveling from South Florida to Atlanta and appeared to Agent Markonni to be nervous in his behaviour. These are the sole facts upon which Agent Paul Markonni and Police Officer Burkhalter conducted the five minute inquiry of the Petitioner. During the inquiry Agent Paul Markonni requested that the Petitioner consent to a search of his luggage. When this was denied Agent Markonni informed the Petitioner that there would be Federal agents awaiting at the Tulsa International Airport.

None of the factors set forth in *United States v. Van Lewis,* 409 F.Supp. 535, E.D.Mich. (1976), *United States v. Elmore,* 595 F.2d 1036, 5th Cir. (1979) and *United States v. Morin,* 665 F.2d 765, 5th Cir (1982) were observed other than subjective interpretation of the Petitioner's nervous state.

In fact, Petitioner's conduct was quite contraindicative of the profile of a drug courier. The Petitioner had checked a large piece of luggage full of personal property and clothing. Petitioner used his own name, gave his own telephone number, paid for an airline ticket through a travel agency with a charge card in his own name, and gave Agent Markonni a reasonable and prompt explanation for his travel plans to Tulsa, Oklahoma. However,

Agent Markonni was not satisfied and proceeded to continue his investigation well beyond the bounds of the guidelines set forth in *Terry v. Ohio,* 392 U.S. 1 (1968) and *Florida v. Royer,* ____ U.S. ____ (1983), each requiring objective facts comprising a reasonable suspicion to approach an individual suspected of criminal activity. Further investigation by Agent Markonni and Federal Drug Enforcement Officers located in Tulsa, Oklahoma was unwarranted and violative of the defendant's Fourth Amendment rights.

Upon arriving at Tulsa the Petitioner deplaned and proceeded to the baggage claim area.The Petitioner rented a car in his own name, paying by charge card. The Petitioner then picked up his luggage from the claim area and proceeded to exit the airport. Approximately three feet from the exit door the Petitioner was approached by Agent Walter Zablocki and a uniformed Tulsa Police Officer. This was consistent with the statement of Agent Markonni that Federal officers would be awaiting in Tulsa, Oklahoma. The Petitioner was requested to move to an isolated part of the airport for an interrogation. The inquiry made by Agent Zablocki was primarily the same as had been made by Agent Markonni relating to the purpose of the Petitioner's trip and repeated requests for a consent to search Petitioner's luggage. In addition, Agent Zablocki read the Petitioner his rights according to the *Miranda* decision. Police confinement had gone beyond the limited permissible detention of a *Terry* investigatory stop and had risen to the level of an arrest requiring probable cause, *Dunaway v. New York,* 442 U.S. 200 (1979). The additional factor relied upon by the Drug Enforcement Agent in seizing the Petitioner was the existence of a prior criminal record. The testimony indicated that the

Petitioner had a conviction in 1969 of a drug related offense, a vague reference to a mental entry in 1975 and a charge of petty larceny in 1979. According to the drug courier profile, this is not a factor which is normally considered in assessing a suspect. At the same time, Agent Markonni had found the vast majority of the drug courier factors used in assessing a suspect to be contra-indicative. The agent had confirmed that the Petitioner had an ex-wife in Tulsa, Oklahoma, that he was using his own name on his luggage, driver's license and airline ticket. It was confirmed that the Petitioner had gone through a travel agency and paid for his ticket by credit card. The callback number was dialed by Agent Markonni, but a busy signal was received.

In spite of the unremarkable behaviour of the Petitioner which was consistent with that of an innocent traveler, the investigation continued. After Agent Zablocki seated the Petitioner in an isolated part of the airport and gave him a *Miranda* warning, there was a sufficient show of authority that a reasonable person would have believed he was not free to leave, *United States v. Mendenhall,* 446 U.S. 544 (1980). It was in fact more than an hour later that Agent Zablocki returned to the Petitioner his driver's license, allowing him to leave without his luggage. A suspect may not even be detained momentarily without reasonable objective grounds for doing so, *United States v. Mendenhall,* 446 U.S. 544 (1980). In spite of this legal doctrine, Petitioner was questioned for approximately ten minutes while a trained dog was summoned. The remarkable capability of this dog was that he was able to detect *explosives* through his keen sense of smell. Upon running the dog through a test pattern around the isolated portion of the airport where the Petitioner's luggage was located, the

dog reacted. It was later brought out that the only time this canine made mistakes in detecting explosives was in the event drugs were located in the area the canine was searching. It is amazing that the Government contends that only if the dog were wrong in reacting to the Petitioner's luggage would additional facts arise to substantiate the use of a drug courier profile. As noted in Judge McKay's dissent in the United States Court of Appeals for the Tenth Circuit, "it is at best questionable whether the dog signaling could be reasonably relied upon to justify any further detention."

Upon the dog's reaction the Petitioner was taken to an isolated room reserved for airport security where he was held for approximately forty-five minutes. He was then told by the DEA Agent, Zablocki, that he was "not under arrest and was free to go." The Drug Enforcement Agent then returned to the Petitioner his driver's license, allowing him to leave. The Petitioner does not suggest that the Court ignore the considerable expertise that law enforcement officials gain from their special training and experience, *United States v. Cortez,* 449 U.S. 411 (1981), *United States v. Mendenhall,* 446 U.S. 544 (1980). However, where the investigation of an individual can bring forth nothing more than subjective observations of that officer, a detention, seizure or arrest is unwarranted. There were no objective facts upon which to base a reasonable suspicion necessary to make an investigatory stop of the Petitioner in Atlanta. After the confrontation in Atlanta, there was certainly nothing more observed that could reasonably bolster the Drug Enforcement Agency's suspicions. The stop in Tulsa was, therefore, unwarranted on an objective factual basis. Certainly the arrest of the Petitioner, reading Miranda warnings and conducting a ten minute inquiry were also

violative of the Petitioner's Fourth Amendment rights requiring probable cause for an arrest.

In *Florida v. Royer,* ____ U.S. ____(1983) the Court indicated that the facts of a nervous young man carrying two American Tourister bags and paying for an airline ticket to a target city under an assumed name did not give rise to arrest that individual. The Petitioner in the instant case did not pay cash and did not use an assumed name. These facts gives rise to far less than a reasonable articulate suspicion necessary under the *Terry* and *Royer* decisions and certainly do not substantiate the probable cause normally required for an arrest under *Denaway v. New York,* 442 U.S. 200 (1979) and *United States v. Mendenhall,* 446 U.S. 544 (1980). It would strain the imagination to believe that the Petitioner consented to any of the conduct engaged in by the Drug Enforcement Agency. Although the Petitioner did not break and run when surrounded by two officers in Atlanta and confronted by a Drug Enforcement Agent and uniformed officer in Tulsa, Oklahoma, he consistently refused to consent to a search. It would be incredible to believe that under the oppressive circumstances a reasonable person would not think he was under arrest.

Noting the lack of articulable and objective facts necessary for a *Terry* type detention, it is immaterial whether the Petitioner was arrested or merely seized and detained. In either event, the conduct of the Drug Enforcement Agency was violative of the Fourth Amendment rights of the Petitioner and contrary to previous holdings in *Terry v. Ohio,* 392 U.S. 1 (1968), *United States v. Place,* ____ U.S. ____ (1983) and *Florida v. Royer,* ____ U.S. ____ (1983).

II

THE USE OF A DOG TRAINED TO DETECT EXPLOSIVES FOR THE PURPOSE OF SUBSTANTIATING A DRUG COURIER PROFILE IS VIOLATIVE OF THE FOURTH AMENDMENT AND INCONSISTENT WITH THIS COURT'S DECISION IN *UNITED STATES v. PLACE*, ___ U.S. ___ (1983).

When this Court decided the case of *Florida v. Royer*, ___ U.S. ___ (1983), the Court noted that the use of trained dogs to detect the presence of controlled substances in luggage was not unheard of. In *United States v. Place*, ___ U.S. ___ (1983), the Court held that the use of a trained dog to detect contraband was a limited intrusion into an individuals Fourth Amendment rights which did not require probable cause. However, no Court has indicated that less than a reasonable articulate suspicion would justify the use of a drug detecting canine.

As argued above, the Drug Enforcement Agency never gained sufficient objective facts upon which to found a reasonable suspicion that Petitioner was engaged in criminal activity. Because of this lack of factual basis, subjecting the Petitioner's luggage to a drug detecting canine would have been violative of this Fourth Amendment rights. Subjecting the Petitioner's luggage to a dog trained to detect explosives after predicating his detention upon a drug courier profile is an absolute absurdity.

Although it appears that this Court has set a standard for the use of a drug detecting canine in *United States v. Place*, ___ U.S. ___ (1983) the particulars

have yet to be ruled upon in the case of the *United States v. Beale*, 674 F. 2d 1327, Cert. Pending No. 82-674, and *United States v. Waltzer*, 682 F. 2d 370, Cert. pending No. 82-5491. The jurisdictions have been in conflict as to when a drug detecting canine may be used, the time period for which an individual may be detained prior to using a drug detecting canine and the nature and extent of the intrusion on the individual's Fourth Amendment interests as opposed to the law enforcement interest that can support a seizure based on less than probable cause.

The Petitioner McCRANIE was in possession of his luggage and exiting the Tulsa International Airport when he was stopped by Agent Zablocki. He had a substantial expectation of privacy while in possession of his luggage, *Arkansas v. Sanders*, 442 U.S. 753 (1979) and *United States v. Chadwick*, 433 U.S. 1 (1977). This is a substantial difference from a case in which the suspect has abandoned his luggage or submitted it to a public depository, *United States v. Waltzer*, 682 F. 2d 370, Cert. pending No. 82-5491; *United States v. Goldestein*, 635 F. 2d 356, Cert. denied, 452 U.S. 962 (1981) and see *United States v. Beale*, 674 F. 2d 1327, Cert. pending No. 82-5491. The least intrusive and most reliable method is the use of a drug detecting canine in a public area where large amounts of luggage have been deposited with a public transportation system. This is a more appropriate type of random search substantiating the reliability of a canine as opposed to the exposure of one suitcase in an isolated portion of the airport to a dog trained to react to explosives.

In the case of *United States v. Place*, ____ U.S. (1983), the Court held that the diligence of the investigating officers should be considered in weighing

the intrusion upon an individual. In the case of this Petitioner, the specific dog used in this investigation was available for several hours. The Drug Enforcement Agents had every opportunity to use the bomb detecting canine when the Petitioner's luggage was deposited with the airline and on a rack in the public baggage claim area. Instead the Petitioner was held, interrogated, read his rights and subjected to repeated requests to consent to a search of his luggage for drugs over a period of ten minutes. During this time, the bomb detecting canine was brought from another area of the airport. It seems highly probable that the Drug Enforcement Agents knew that there did not exist any probable cause or reasonable articulable facts to substantiate subjecting the Petitioner to a seizure, detention or search. The consent search authorized by the Petitioner would have been the only permissible action by the Drug Enforcement Agents. Without this consent the Drug Enforcement Agents used their last available tactic in summoning the bomb detecting dog which reacted to the Petitioner's suitcase. Prior to the Petitioner's Motion to Suppress, the Drug Enforcement Agent in Tulsa, Oklahoma, Walter Zablocki, was stricken by a heart attack and died. No testimony was available as to any factors he relied upon in stopping the Petitioner independent of those established by Paul Markonni.

Lacking reasonable articulable suspicion to detain the Petitioner for questioning, there were certainly not sufficient facts to justify subjecting his luggage to a canine. It is a travesty to allow a dog trained for the purpose of detecting explosives to examine the Petitioner's luggage based upon less than articulable reasonable suspicion or on any other standard where

facts were not existing to substantiate the possibility that Petitioner was carrying explosives.

The decision of the Trial Court and United States Court of Appeals for the Tenth Circuit is inconsistent with the standards set forth by this Court in *United States v. Place,* ___ U.S. ___ (1983) and *Florida v. Royer,* ___ U.S. ___ (1983) and certiorari should, therefore, be granted. Moreover, the decisions throughout the Circuits are unsettled and the cases pending in this Court of *United States v. Beale,* Cert. pending No. 82-674 and *United States v. Waltzer,* Cert. pending No. 82-5491, will hopefully put to rest the questions relating to drug detecting canines and the corresponding intrusion into Fourth Amendment rights. Certiorari should, therefore, be granted.

III

THE ISSUANCE OF A WARRANT TO SEARCH PETITIONER'S LUGGAGE WAS NOT PREDICATED ON PROBABLE CAUSE AND, THEREFORE, VIOLATED THE PETITIONER'S FOURTH AMENDMENT RIGHTS

On September 22, 1981, an investigation of the Petitioner stretching across the United States from Atlanta, Georgia to Tulsa, Oklahoma was made on the suspicion that the Petitioner was engaged in transporting illegal drugs. The investigation spanned half the continent and extended over a period of approximately four hours. The continued investigation was carried out on the basis of the Petitioner's characteristics which were subjectively observed by Drug Enforcement Agents and matched to a drug courier

profile. At all times, the Petitioner was informed by the Drug Enforcement Agents that he was suspected of carrying a load of drugs. Throughout the investigation the facts never substantiated a founded articulable suspicion or probable cause which would warrant detaining, investigating or arresting the Petitioner.

The Drug Enforcement Agency was not to be denied in its resourcefulness and efforts to fully investigate their suspicions. A bomb detecting dog was, therefore, summoned to examine the Petitioner's luggage and add some factor toward establishing articulable suspicion or probable cause. On September 22, 1981 a Search Warrant was issued by the U.S. Magistrate for the purpose of examining a tan-colored American Tourister suitcase, approximatedly 2½ feet by 3 feet for explosives and components of an unregistered explosive device, fruits, evidence and instrumentalities of a violation of 26 U.S.C., § 5861 and 18 U.S.C., § 842 (A) (3) (a), (Appendix F). This Warrant was issued upon an Affidavit executed by Agent Walter Zablocki setting forth facts showing an investigation of the Petitioner from Atlanta, Georgia to Tulsa, Oklahoma based upon characteristics conforming to the drug courier profile. Midway through the Affidavit the primary thrust shifts from a drug investigation to the investigation of a citizen suspected of carrying explosives pursuant to the reaction of a bomb detecting dog.

There had been no indication from any source that the Petitioner was carrying an explosive device or materials. There were no threats made by the Petitioner and there were no alerts from any electronic sensor devices. It is a substantial indication of the competitive nature of law enforcement that after the issuance of the

Warrant, testimony was given at the Petitioner's hearing on his Motion to Suppress that the bomb detecting dog was also used for the purpose of locating drugs; that (T.J.) the bomb detecting dog was mistaken in his identity of explosive materials only a small percentage of the time and that the mistakes were usually related to the existence of drugs. The Trial Court and the United States Court of Appeals for the Tenth Circuit characterized T.J. as majoring in explosives and minoring drugs.

From all of the testimony given at the Petitioner's Motion to Suppress it appears that the Affidavit in support of a Warrant to search for explosive materials was a subterfuge to examine this Petitioner's luggage for the purpose of uncovering drugs.

Usually a material misstatement in an affidavit supporting a search warrant will not invalidate the warrant under the Fourth Amendment if the misstatement was made in good faith without an intentional disregard for the rights of the individual, *United States v. Martin,* 441 U.S. 962 (1979). However, if the defendant can establish that a warrant affidavit contains a statement or statements that are either deliberate falsehoods or made with reckless disregard for their truth and the Court finds the challenged material is necessary to a finding of probable cause, then a warrant must be voided, *United States v. Jabara,* 618 F. 2d 1319 (1980).

There is no doubt that probable cause to search the Petitioner's luggage for the existence of drugs would not have existed without the bolstering reaction of the dog qualified to detect dangerous substances for the protection of the public. Judge McKay noted in his

dissent in the United States Court of Appeals for the Tenth Circuit that it is untenable that the Petitioner would have been held by the Drug Enforcement Agency if he truly were suspected of carrying explosive materials.

The Warrant for seizure of the Petitioner's luggage is unjustified, and the fact that the Warrant was obtained before the suitcase was opened does not justify its seizure of the contents nor bolster probable cause, *United States v. Allen,* 644 F. 2d 749 (1980).

The Drug Enforcement Agents turned the normal process of a *Terry* detention used in establishing probable cause for the issuance of a warrant into a subterfuge to examine the contents of this Petitioner's luggage. The bounds of procedure, justice and this Petitioner's Fourth Amendment rights have been grossly exceeded by the Drug Enforcement Agents and the Court should, therefore, grant certiorari to review the conduct and examine the underlying probable cause for issuance of a warrant.

CONCLUSION

Based upon the foregoing arguments, the Petitioner prays that certiorari be granted.

Respectfully Submitted,

KEN RAY UNDERWOOD

Best Copy Available

APPENDIX A

RECEIVED

APPENDIX A

United States District Court

NORTHERN DISTRICT OF OKLAHOMA

DOCKET NO. 91-CR-93-E

JUDGMENT AND COMMITMENT ORDER

DEFENDANT: DENNIS BARNES McCARNEY

COUNSEL: In the presence of the attorney for the government, the defendant appeared in person on this date (MONTH 1, DAY 9, YEAR 92)

[ ] WITHOUT COUNSEL However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jon Dugan and Rob Lind (Name of counsel)

PLEA: [ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [X] NOT GUILTY

FINDING & JUDGMENT: There being a finding of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY

Defendant has been convicted as charged of the offense(s) of having violated Title 21, U.S.C., Sections 841(a)(1); as charged in the Indictment.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

THREE (3) YEARS.

IT IS FURTHER ORDERED that the defendant may become eligible for parole at such time as the Parole Commission may determine as provided in T. 18, USC, Sec. 4205(b)(2).

IT IS FURTHER ORDERED that the defendant be placed on TWO (2) YEARS Special Parole term to begin upon release from institution.

SPECIAL CONDITIONS OF PROBATION:

FILED

JAN 1992

JACK C. SILVER, CLERK

U.S. DISTRICT COURT

ADDITIONAL CONDITIONS OF PROBATION: It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

COURT MAKES THE FOLLOWING RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, the institution designated by the Attorney General or his authorized representative for imprisonment.

CERTIFIED AS A TRUE COPY ON _____

THIS DATE _____

BY _____ CLERK / DEPUTY

SIGNED BY: [X] U.S. District Judge [ ] U.S. Magistrate

S/ JAMES O. ELLISON

James O. Ellison

Date _____

3-25-83 82-1053

APPENDIX B

United States Court of Appeals
For the Tenth Circuit

SLIP OPINION

FILED
United States Court of Appeals
Tenth Circuit

MAR 25 1983

HOWARD K. PHILLIPS
Clerk

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1053
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DENNIS BARNES McCRANIE,
Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Oklahoma
(D.C. No. 81-CR-92)

Ken Ray Underwood, Tulsa, Oklahoma, for Defendant-Appellant.

Kenneth P. Snoke, Assistant United States Attorney, Northern District of Oklahoma, Tulsa, Oklahoma (Frank Keating, United States Attorney, Tulsa, Oklahoma, with him on the brief), for Plaintiff-Appellee.

Before DOYLE, McKAY, Circuit Judges, and TEMPLAR, District Judge.*

DOYLE, Circuit Judge.

*Honorable George Templar, Senior District Judge, District of Kansas, sitting by designation.

In this appeal from a criminal conviction in the Northern District of Oklahoma the defendant-appellant was charged with violating 21 U.S.C. § 841 (a) (1), possession of cocaine with intent to distribute.[1] He seeks review in this court. He waived a jury and was tried on stipulated facts. On the basis of those facts, as well as the testimony in his motion to suppress hearing, McCranie was found guilty and received a three year sentence.

On the morning of September 22, 1981 McCranie was seen by narcotics agent Paul Markonni as he disembarked from the plane at the Atlanta airport. Markonni had not been looking specifically for McCranie. Instead he had been observing incoming passengers generally. Agent Markonni had been working at the Atlanta airport for approximately three years and had been with the DEA, or its predecessor agencies, a total of twelve years. Agent Markonni concluded that McCranie was acting in a suspicious fashion. He decided to observe him further.[2] McCranie's flight had been to Atlanta from Fort Myers, Florida via Tampa, Florida, and he was catching a connecting flight to Tulsa,

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[1] 21 U.S.C. § 841 (a): Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally — 1) to manufacture, distribute, or disperse, or possess with intent to manufacture, distribute or disperse, a controlled substance;...

[2] Markonni's testimony was that McCranie looked at him repeatedly while getting flight information from an airline agent. Markonni was dressed in civilian clothes, not a uniform.

Oklahoma, where he alleged that he planned to visit his ex-wife and children.

Markonni obtained McCranie's name and travel plans from an airline agent from whom McCranie had obtained directions for his Tulsa flight. After observing passengers come in off another plane from Florida, Agent Markonni checked McCranie's reservation record, then went to the gate where McCranie was waiting for his Tulsa flight. There, Agent Markonni and another detective verified McCranie's ticket at the desk and learned that he was flying on a one-way ticket which he had purchased in his own name from a travel agent. They then saw McCranie looking out a window. Markonni apparently attempted to call the telephone number that McCranie had listed on his reservation record as his home telephone but, after getting only a busy signal, he decided to interview McCranie.

Markonni identified himself and sat in the seat right next to McCranie, who willingly produced his ticket and identification. He also answered Agent Markonni's questions. However, Markonni felt that McCranie was becoming more nervous as the interview progressed and for that reason he specifically asked McCranie if he was carrying drugs and if he would allow Markonni to search his person and luggage. McCranie had checked one suitcase through the airline. He refused Markonni permission to search his bag but apparently consented to a personal search.

Markonni quit questioning McCranie and ended their interview by telling McCranie to expect to be met by other agents in Tulsa. McCranie boarded his Tulsa flight. In the meantime Markonni went to the baggage facilities and identified McCranie's suitcase and notified

Agent Zablocki in the DEA office in Tulsa of his suspicion that McCranie had illicit drugs in his suitcase and described that suitcase for Zablocki. Markonni also contacted the sheriff's office in McCranie's home county and learned that McCranie had a criminal record which included arrests for sale and possession of narcotics, grand larceny, aggrevated assault, and an entry regarding mental instability.[3] Markonni passed this information along to Agent Zablocki in Tulsa in a second phone call.

When McCranie arrived at the Tulsa airport, he rented a car, picked up his suitcase and headed outside, but before he reached the airport exit, Agent Zablocki called to him and then came over, identified himself and asked permission to speak with him. McCranie consented to speak with Agent Zablocki, so they moved to some seats nearby, accompanied by Lt. McDonald of the Tulsa police. Agent Zablocki read McCranie his *Miranda* rights. McCranie said he did not wish to have an attorney present. Both officers may have told McCranie that he was not under arrest. Zablocki requested a search of McCranie's suitcase, but the latter refused. Zablocki had a trained sniffing dog summoned. It arrived within two minutes. Meanwhile, three other uniformed policemen in addition to Agent Zablocki and Lt. McDonald positioned themselves in the general area. The dog, T.J., and its handler arrived and went through two search patterns which included McCranie's suitcase. Both times T.J.

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[3] The evidence in the record is not clear, but McCranie did admit there was an entry on his "rap sheet" regarding a "mental disability." (*See* Record, Vol. IV at 182, 199-200).

signalled by the luggage. McCranie had at this time been delayed less than ten minutes.

T. J. was trained to detect explosives. He had "graduated" first in his explosives sniffing class and had been reliable in 98.9% of explosives searches he had done in training. The times he had incorrectly signalled for explosives were when he had sniffed hidden drugs. T.J. had no drug-sniffing training, but did seem able to detect hidden drugs in informal tests his handler conducted. As the trial court observed, "He had minored in drugs and majored in explosives."

After T.J.'s signals, Agent Zablocki told McCranie they were going downstairs to the airport security office. A bomb technician took control of the suitcase along the way to the office. All the policemen and Zablocki accompanied McCranie to the office. He was allowed to call his attorney approximately fifteen minutes to an hour after entering the airport security office. McCranie asked if he was under arrest; he was told, "No," so he left.

Later, after obtaining a search warrant, the police x-rayed McCranie's suitcase for explosives. They found none, and so they opened the suitcase. Inside they found a white powdery substance, allegedly cocaine.

The trial judge held a full supression hearing and after arguments by counsel he decided not to exclude the contents of McCranie's suitcase from trial.

The trial judge ruled that the detention in Atlanta was proper and that there was nothing wrong with Agent Markonni telephoning ahead to Tulsa to notify Agent Zablocki of his suspicions. He further found that the detention in Tulsa was proper and that the search

warrant for McCranie's suitcase was issued on probable cause.

In this court McCranie contends that he was stopped and seized in Tulsa only on Agent Markonni's hunches; that there were no articulable, objective observations of his behavior that gave the police a reasonable suspicion that he had committed a crime. T.J.'s signals may have provided reasonable grounds to stop McCranie, but those signals came after McCranie had already been detained on insufficient grounds. The government argues that McCranie was not seized because a reasonable person in his circumstances before T.J. arrived would have believed that he was free to go. Even if McCranie was seized, all the circumstances gave Agent Ziblocki adequate reason to hold McCranie temporarily, the government contends.

The issues are simple.

1. *Did the trial court properly admit evidence found in McCranie's suitcase? (a) Was he not "seized" during initial interviews so no Fourth Amendment rights were implicated, or (b), was he seized but on adequate grounds based on the agents' articulable suspicion?*

2. *Was the use of the dog to sniff McCranie's suitcase an illegal search?*

If it is assumed that McCranie was seized during the questioning which occurred prior to T.J. sniffing the suitcase, the agents should have had a reasonable suspicion that McCranie was engaged in criminal activity. United States v. Brignoni-Ponce, 422 U.S. 837, 884 (1975); Terry v. Ohio, 392 U.S. 1, 21-22 (1968). If the limited questioning in Atlanta and Tulsa which preceded T.J.'s signals was instead only "police-citizen contact," a

lesser standard might apply. *See* United States v. Mendenhall, 446 U.S. 544, 551-57 (1980) (Stewart, J., concurring).

Other circuit courts have noted that the Supreme Court has not yet given lower courts a clear indication of when a "mere police-citizen contact" stops and a "seizure" implicating defendant's fourth and fourteenth amendment rights begins. United States v. Black, 675 F. 2d 129, 132-34 (7th Cir. 1982), *petition for cert. filed* 51 U.S.L.W. 3026 (June 3, 1982); United States v. Setzer, 654 F. 2d 354, 357 (5th Cir. 1981); United States v. Berd, 634 F. 2d 979, 984 (5th Cir. 1981). Cases currently pending Supreme Court review may resolve this issue.[4]

We do not view this as artibrary police harrassment of innocent travelers. Rather, as we see it, these officers were very careful and did not rush into their investigation based on inadequate evidence. The trial court found that the detention by Agent Markonni in Atlanta was valid. Further, he found that the detention in Tulsa by Agent Zablocki was based on reasonable suspicion. The evidence favorable to the government supports the trial judge's denial of McCranie's motion to suppress. United States v. Rios, 611 F. 2d 1335, 1344 (10th Cir. 1979). McCranie was not "seized," so to speak, during the interview in Atlanta. Markonni questioned him in a public waiting area. *Compare* United States v. Black, 675 F. 2d 129, 135 (7th Cir. 1982), *with* United

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[4] United States v. Place, 660 F. 2d 44 (2d Cir. 1981), *cert. granted*, 102 S. Ct. 2901 (1982), and *cert. denied*, Place v. United States, 102 S. Ct. 2905 (1982); Florida v. Royer, 389 So. 2d 1007 (Fla. App. 1979), *cert. granted*, 454 U.S. 1079 (1981); Black v. United States, 675 F. 2d 129 (7th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3026 (June 3, 1982); Martell v. United States, 654 F. 2d 1356 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3803 (Feb. 15, 1982); West v. United States 651 F. 2d 71 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3132 (Aug. 14, 1981).

States v. Lara, 638 F. 2d 829, 894, 899 (5th Cir. 1981) *and* United States v. Jefferson, 650 F. 2d 854, 858 (6th Cir. 1981).

The evidence does not disclose that there was overt display of police authority, United States v. Mendenhall, 446 U.S. 544, 551-57 (Stewart, J., concurring); neither his wallet nor his ticket were seized, *Black, supra,* 675 F. 2d at 140 (Judge Swygert, dissenting). The entire encounter in Atlanta took only a short time. As a result a reasonable person faced with the circumstances would not have been pressured or compelled to answer Markonni's questions, or isolated and restrained. United States v. Regan, 687 F. 2d 531, 535 (1st Cir. 1982); *Black, supra,* 675 F. 2d at 135.

When the Atlanta interview occurred, Markonni initiated it based upon what he regarded as suspicious behavior. United States v. MacDonald, 670 F. 2d 910, 913 (10th Cir. 1982) we are mindful that law enforcement officials have been exposed to special training and experience). Certainly Markonni's conduct tended to show this.

Before approaching McCranie, Markonni learned that he had used a one-way ticket to fly an unusual route out of Fort Myers. Despite Markonni's experience in spotting drug couriers, United States v. Sentovich, 677 F. 2d 834 (11th Cir. 1982); United States v. Berd, 634 F. 2d 979, 981 n. 1 (5th Cir. 1981), it is argued that he did not have articulable grounds to seize McCranie. He did, however, have adequate reasons to initiate a police-citizen contact in order to verify his several suspicions. *See Mendenhall, supra,* 446 U.S. at 551-57. Since Markonni's brief questioning of McCranie went no further than that contact, it was proper and did not taint

evidence obtained from McCranie in the subsequent police encounter. *Cf.* Royer v. State, 389 So. 2d 1007, 1015 (Fla. App. 1979), *petition denied* State v. Royer, 397 So. 2d 779 (Fla. 1981), *cert. granted* 454 U.S. 1079 (1981) (en banc decision by the Florida Court of Appeals that defendant's "consent" to search his luggage was tainted by seizure without probable cause).

In the interview which Markonni conducted he learned that McCranie was going to visit his children and ex-wife in Tulsa. Following his contact with McCranie in Atlanta, Markonni had learned that McCranie had a criminal record, including prior narcotic entries. There was also an entry regarding mental instability and there were recent entries for larceny. Also noteworthy was the fact that Markonni observed that McCranie became nervous when questioned about carrying drugs.

Markonni properly relayed what he had learned to Agent Zablocki in Tulsa. The trial judge concluded that Agent Zablocki had enough information concerning the defendant to provide him with suspicions adequate to detain McCranie in Tulsa and to summon the sniffing dog. In United States v. Morin, 665 F. 2d 765, 768-69 n.9 (5th Cir. 1982) it was held that the defendant's drug courier profile which included prior narcotics arrests gave authorities "the requisite information to justify an investigatory stop."

The use of a sniffing dog is not a search or seizure. United States v. MacDonald, 670 f. 2d at 910, 914; *see* United States v. Waltzer, 682 F. 2d 370, 372-73 (2d Cir. 1982). The court there said:

> "We regard the dog's designation of the luggage as itself establishing probable cause, enough for the arrest, more than enough for

> the stop . . . . The testimony indicated that the dog Kane had a record of 100 percent accuracy. Given that record of accuracy and the designation of luggage connected to Waltzer by independent evidence, the DEA agents did not have to stand helplessly by while Waltzer claimed the luggage and left the airport."

Here Zablocki could have had McCranie's suitcase sniffed without having reasonable suspicions that McCranie was engaged in criminal activity, although authorities must have some suspicion luggage contains contraband before it can be sniffed. *Waltzer, supra,* 682 F. 2d at 372-73. In that case there was no illegal search of defendant's luggage when it was sniffed before defendant picked it up and before police reasonably suspected him of criminal activity. United States v. Goldstein, 635 F. 2d 356, 361 (5th Cir. 1981); Annot., 31 ALR Fed 932 (1977).

Finally, McCranie was detained less than ten minutes in a public area near where he was first approached. From this it is possible to conclude that he was not actually seized in Tulsa until after the dog's signals gave officers probable cause. United States v. Black, 675 F. 2d 129, 134 (7th Cir. 1982), *petition for cert. filed* 51 U.S.L.W. 3026; United States v. Berd, 634 F. 2d 979, 985 (5th Cir. 1981). Even if McCranie was seized when Agent Zablocki asked permission to speak with him and advised of his rights under *Miranda, see MacDonald, supra,* 670 F. 2d at 912, and the drug courier profile characteristics that had been displayed by McCranie in themselves would not support the action taken in seizing him, Reid v. Georgia, 448 U.S. 438, 441

(1980), those characteristics combined with his criminal record certainly did constitute sufficient evidence. *Compare* United States v. Morin, 665 F. 2d 44 (5th Cir. 1982) (successive stops based on the same information constitute a seizure not a mere contact) *with* United States v. Berd, 634 F. 2d 979, 985 (5th Cir. 1981). In the *Berd* case the agent's discoveries after he initially approached the suspected drug couriers gave him reasonable suspicion.

The signals given by the dog certainly gave the officers reasonable suspicions that the bag contained contraband. Thus, they properly held McCranie's luggage until they could obtain a warrant to search it. The obtaining of the warrant is, of course, the bottom line. The officers exercised great care in handling the case and none of the happenings show any violation of the defendant's rights.

When Zablocki saw McCranie leaving the building with his luggage at the Tulsa airport, he was faced with the necessity of detention of McCranie for the brief moment of time it would take to complete investigating him by either gaining his consent to search the suitcase or by having the suitcase sniffed. It became necesary to follow the latter course. It turned out that it thwarted McCranie's illegal mission and it accomplished this without violating his rights under the fourth amendment. This is how the trial judge ruled following a hearing on McCranie's motion to suppress. His denial of that motion was proper and it is hereby affirmed.

No. 82-1053 — UNITED STATE OF AMERICA v. DENNIS BARNES McCRANIE

McKAY, Circuit Judge, dissenting:

The bottom line of the seizure and subsequent search conducted in this case is the so-called "drug courier profile" routinely employed by drug enforcement officials. Use of the profile is a prime example of organized enforcement efforts that are rapidly eroding our protection against unwarranted, arbitrary intrusions by public officials. This erosion is made easier since, in the isolation of the judiciary, we tend to see its impact only on wretched peddlers of misery like the one before us. The periodic intrusions on the rest of us — when, from time to time, our conduct fits the objective behavior relied on by these officers — tend to be lost or ignored when we assess the reasonableness of the conduct in cases like this one.[1] Even worse, the device ratified here not only readily lends itself to unreviewable racial bias but in all probability already incorporates and routinely employs it. *See United States v. Vasquez,* 612 F. 2d 1338, 1353 n.10 (2d Cir. 1979) (Oakes, J., dissenting) (agent's testimony that race plays role in formulation of suspicion).

We know little or nothing about the characteristics that make up that profile. Nor do we know about the standards or criteria that guide an agent's application of

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[1] Although the DEA apparently does not keep statistics, one agent has estimated that "an experienced agent can have a 60-70%" successful observation rate. Comment, *Reformulating Seizures — Airport Drug Stops and the Fourth Amendment,* 69 Calif. L. Rev. 1486, 1488 n.11 (1981). Even without discounting for inexperience and the tendency to overstate one's successes, this estimate demonstrates that intrusions on innocent people are widespread.

it to particular individuals.[2] We have only broad, self-serving police assurances that reliance on the profile and the agent's judgment is well-founded.

In this case, we are told that suspicion was first aroused when the defendant, while getting flight information, looked repeatedly at the agent. I find that remarkable only in that it describes so many perfectly innocent people. We are further told that the defendant's flight was from Fort Myers, Florida via Tampa to Atlanta for a connecting flight to Tulsa, Oklahoma. That Fort Myers is a drug source city is equally unremarkable. If we are to believe the representations that parade before us, every city in the United States large enough to have a substantial public airport is a "drug source city." *See United States vs. Pulvano,* 629 F. 2d 1151, 1155 n.1 (5th Cir. 1980). To this we add that the defendant was flying on a one-way ticket — we are not told what percentage of innocent travelers fly one way — and that the agent saw the defendant looking out a window at the plane.

On this information, the agent initiated an interview in which he learned that this suspicious and devious man traveled under his own name and listed his home phone. He also learned that the defendant was going to Tulsa to visit his ex-wife and children. The defendant's nervousness is supposed to add some justification for the police conduct that followed. I strongly doubt, however, that even a federal judge would not appear nervous under similar circumstances, no

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[2] What little we do know from this or other records is consistent with innocent behavior. *E.g.*, United States v. Pulvano, 629 F. 2d 1151, 1155 n.1 (5th Cir. 1980); United States v. McCaleb, 552 F. 2d 717, 719-20 (6th Cir. 1977).

matter how innocent his behavior. The agent then pressed the defendant about drugs and was refused permission to search his luggage. I know many people who resent unjustified police interference and who, like the defendant, lawfully would refuse permission to search their bags even though they contain nothing illegal.

After that interview, the agent notified counterparts in Tulsa of his "suspicions." During the defendant's flight to Tulsa, the agent learned of the defendant's previous arrests and of a "rap sheet" entry regarding a "mental disability." Record, vol. 4, at 199-200. In my opinion, the check of the "rap sheet" adds nothing in this case unless people who have previously been arrested are excepted from fourth amendment protection.[3] In addition, I am at a loss and alarmed that some justification for the intrusion seems to come from evidence that the defendant had a "mental disability."

While the contact in Atlanta, where the defendant readily identified himself, delivered his ticket, and answered questions, undoubtedly fits the suphemism of "inoffensive contact between a member of the public and the police," *United States v. Mendenhall,* 446 U.S. 544, 555 (1980) (Stewart, J., concurring), what happened in Tulsa cannot remotely be described as either a nonseizure or a reasonable intrusion.

As the defendant was about to leave the Tulsa airport, a DEA agent and a Tulsa police officer stopped

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[3] The "rap sheet" check did reveal an earlier drug-related offense; however, there was only one such offense for which the defendant was arrested in 1969, twelve years before the airport confrontation in this case. Record, vol. 4, at 182.

him and took him back into the airport where they and three other uniformed officers strategically placed themselves to detain the defendant while they sent for a search dog. Even a casual observer of news events is aware of police shootings of "suspects." One in this defendant's place would be foolhardy to attempt to leave. Surely when we decide whether "a reasonable person would have believed that he was not free to leave," *id.* at 554, we do not wish by the standards we employ to encourage people to get shot or otherwise have violent encounters with the police. While the defendant was held for fewer than fifteen minutes before the dog "T.J." arrived, the detention clearly amounted to a seizure. It was intended to and did hold him until the dog arrived. *Cf. Dunaway v. New York,* 442 U.S. 200, 207 & n.6 (1979) (detention for custodial interrogation constitutes seizure). If any doubt as to whether the defendant was seized could exist, the lead agent's reading the defendants his *Miranda* rights lay it to rest. According to the testimony — and it would be embarrassing to suggest otherwise — the defendant was not then free to go. It is at that point that the basis for the police conduct must be measured. What the dog found is therefore irrelevant although certainly not without its own problems.[4]

Use of the "drug courier profile" seems to me to be a particularly invidious practice, especially when it is left

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[4] T.J. was trained to sniff out bombs. We are of course told of his success record in ferreting out explosives even though we are carefully not told the success record of his counterpart who initiated contact in Atlanta. However, this was a search for narcotics — not explosives. It would strain credulity or worse to suggest that the officer brought the defendant back into the airport to detain him around other passengers for a period of time if they remotely suspected a bomb. Thus, it is at best questionable whether the dog's signaling could reasonably be relied on to justify any further detention.

to the shifting subjective vagaries of the individual officer. *See Vasquez*, 612 F. 2d at 1352-53 & n.10. We should not begin to ratify it until both its standards and its potential for abuse have been thoroughly scrutinized. My general concerns are more elaborately and articulately spelled out in the dissent of Judge Oakes in *Vasquez*, 612 F. 2d at 1348-53. They seem to me equally supported by the Supreme Court's per curiam opinion in *Reid v. Georgia*, 448 U.S. 438 (1980).

Since there was insufficient cause to justify the seizure, I would reverse the conviction.

APPENDIX C

MARCH TERM — May 13, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monore G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Court Judges, and Honorable George E. Templar, District Court Judge.*

No. 82-1053
UNITED STATES OF AMERICA
Plaintiff-Appellee,
vs.
DENNIS BARNES McCRANIE,
Defendant-Appellant.

The Court, on its own motion, in order to correct clerical errors in the entry of an order on May 12, 1983 denying rehearing and denying suggestion for rehearing en banc; hereby vacates said order and reenters the order, nunc pro tunc, as shown in the caption and body hereof:

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge McKay voted to grant rehearing.

The clerk having transmitted the suggestion for rehearing en banc to the Court, and a vote having been taken, it is ordered that the suggestion for rehearing in

banc is denied. Judges McKay and Seymour voted to grant rehearing in banc.

HOWARD K. PHILLIPS, Clerk

*of the United States District Court for the District of Kansas, sitting by designation.

MARCH TERM — May 12, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable George E. Templar, District Court Judge.*

No. 82-1053
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
DENNIS BARNES McCRANIE,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied. Circuit Judges McKay and Seymour voted to grant rehearing and suggestion for rehearing en banc.

HOWARD K. PHILLIPS, Clerk

*of the United States District Court for the District of Kansas, sitting by designation.

APPENDIX D

Supreme Court of the United States

No. A-1031
DENNIS BARNES McCRANIE,
Petitioner,
v.
UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 10, 1983.

/s/ Byron R. White
Associated Justice of the Supreme Court of the United States

Dated this 23rd day of June, 1983

APPENDIX E

STATE OF OKLAHOMA
COUNTY OF TULSA

AFFIDAVIT

The undersigned, after first being duly sworn, deposes and states:

I am a Special Agent of the United States Drug Enforcement Administration and have been an agent for twelve (12) years.

On September 22, 1981 I received a communication from Special Agent Paul Marconi, a Drug Enforcement Agent with whom I am familiar who is stationed in Atlanta, Georgia at the Atlanta International Airport. Special Agent Marconi informed me that he had a conversation with a man who identified himself as Dennis Barnes McCranie whose date of birth is October 1, 1949 who was en route to Tulsa, Oklahoma from Ft. Meyers, Florida. Special Agent Marconi informed me that he asked Mr. McCranie a few questions about where he was coming from and where he was going and also asked Mr. McCranie for permission to search his luggage. Special Agent Marconi informed me that at this point Mr. McCranie became extremely nervous and jittery. Mr. McCranie refused to allow a search of his checked suitcase but consented to a personal search prior to boarding a plane from Atlanta to Tulsa. Special Agent Marconi determined that Mr. McCranie was traveling to Tulsa on a one-way ticket purchased in Ft. Meyers, Florida and that McCranie claimed to live in Florida at the time. Mr. McCranie was not further detained and boarded a flight for Tulsa which was scheduled to arrive at 11:45 a.m. Tulsa time. Special Agent Marconi who has

a great deal of experience in drug profile cases in Atlanta and elsewhere called to alert us of the extremely nervous behavior of Mr. McCranie.

With cooperation of the Tulsa Police Department a record check was done on Dennis Barnes McCranie, date of birth October 1, 1949 which showed that he had an extensive criminal record including prior convictions for possession and sale of drugs and arrests for grand larceny and petty larceny, the most recent being in March 1979. His record also showed an entry for mental disability which occurred in December 1975.

Upon arrival at Tulsa International Airport, a specially trained police dog named "T.J." was run by Mr. McCranie's suitcase which is described as a tan American Tourister, Escort model, bearing Eastern Airlines baggage check number EA885618. This dog was handled by his canine officer/handler, Officer Oscal Hall of the Tulsa Police Department.

This dog, "T.J.", together with his canine officer/handler, Oscar Hall, has recently completed a 22-week school in explosives identification at Lackland Air Force Base. During the school, Officer Hall informs me that "T.J." was the highest in his class in all tests, having a 98% record of correctly identifying, by smell, explosives, during the course of the 22 week school. "T.J." is a graduate of said school.

Upon coming in close proximity to the above-described suitcase, "T.J.", on two different occasions,

reacted to the same location on one side of said suitcase, indicating the presence of explosive materials therein.

WALTER M. WABLOCKI
Special Agent
Drug Enforcement Administration

Subscribed and sworn to before me this 22nd day of September, 1981.

ROBERT S. RIZLEY
United States Magistrate

APPENDIX F

Search Warrant

United States District Court

FOR THE
NORTHERN DISTRICT OF OKLAHOMA
Docket No. 81
Case No. 117M
SEARCH WARRANT
UNITED STATES OF AMERICA
vs.
One Tan Colored American
Tourister Suitcase with
Combination Lock

To Walter M. Zablocki, Special Agent, Drug Enforcement Administration

Affidavit(s) having been made before me by Walter M. Zablocki, Special Agent, Drug Enforcement Administration, that he has reason to believe that on the premises known as One Tan Colored American Tourister Suitcase with Combination Lock, approximately 2-1/2 feet by 3 feet by 8 inches, ESCORT model, bearing Eastern Airlines baggage ticket #EA885618, currently located at Tulsa International Airport, Tulsa, Oklahoma, in the Northern District of Oklahoma there is now being concealed certain property, namely explosives and components of an unregistered explosive device, fruits, evidence and instrumentalities of a violation of 26 U.S.C. §5861 and 18 U.S.C. §842 (a) (3) (A), and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for

application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of Ten (10) days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search (in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before Robert S. Rizley (magistrate) as required by law.

Dated this day of September 22, 1981

_____,

Judge (Federal or State Court of Record) or Federal Magistrate.

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).